



NUCLEAR ENERGY INSTITUTE

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MEMBER WIDE REPRESENTATIVE AND
CHIEF NUCLEAR OFFICER
NUCLEAR GENERATION

Mr. Frank J. Congel
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
Mail Stop O-14E1
Washington, DC 20555-0001

SUBJECT: Proposed Revision to NRC Enforcement Policy

Dear Mr. Congel:

On March 9, 2001, the NRC published a notice that the agency is considering a revision to its "General Statement of Policy and Procedure for NRC Enforcement Actions" (NUREG-1600). Along with related and conforming changes to other sections, the proposed revision substantially modifies and clarifies the text of Section VIII, "Enforcement Actions Involving Individuals." The *Federal Register* notice stated that the "intent of the revision is to more clearly identify the thresholds and outcomes for taking enforcement actions that involve individuals." 47 Fed. Reg. 14224 (March 9, 2001).

Although the *Federal Register* notice did not specifically invite comment, we understand that the NRC welcomes review and comment on the proposed Enforcement Policy revision. On behalf of the commercial nuclear energy industry, the Nuclear Energy Institute (NEI)¹ is pleased to offer the following comments and would welcome the opportunity to participate in any further discussions or meetings on this topic.

The industry recognizes the NRC's policy objectives in adopting 10 C.F.R. § 50.5 (the Deliberate Misconduct Rule). Actions by individuals, either licensed or non-licensed, that amount to deliberate misconduct cannot be tolerated. Nuclear licensees depend on their employees and contractors to safely operate the nuclear plant and perform all other assigned tasks in compliance with NRC regulations. Thus, individuals engaged in nuclear licensed activities are entrusted with the

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.



weighty responsibility of protecting the public health and safety. Accordingly, licensees must maintain appropriate oversight and must, consistent with appropriate human resource policies and procedures, implement appropriate corrective actions—including disciplinary actions when warranted—for misconduct and other human performance issues.

The industry understands the NRC's current policies and that the NRC will consider individual enforcement actions in appropriate circumstances for deliberate misconduct that meets 10 C.F.R. § 50.5. However, as the NRC has long recognized in its Enforcement Policy, enforcement actions involving individuals "are significant personnel actions, which [should] be closely controlled and judiciously applied," NUREG-1600, Section VIII (May 2000). Individual enforcement actions carry the potential to damage the reputations, livelihoods, and careers of employees in the nuclear energy industry. For this reason, matters of human performance and even some incidents of deliberate misconduct are often best left to licensee management to address and resolve through normal procedures. Moreover, when individual enforcement is considered, a full and fair process is imperative.

The proposed Enforcement Policy revision does not appear to be a major change in NRC's current approach to enforcement actions involving individuals. Rather, it is largely a clarification of the existing approach. Given the nature and significance of the matters involved, a more well-defined procedure, a clearer understanding of possible outcomes, and a more direct statement of the considerations to be weighed and the thresholds to be applied, will improve this aspect of the Enforcement Policy. However, some of the proposed features of the Enforcement Policy revision warrant further discussion. We describe these as follows.

First, Section VIII retains the language quoted above regarding close control and judicious application of enforcement actions against individuals. Section VIII.A also appropriately focuses on the scope of 10 C.F.R. § 50.5—directed at individuals (licensed or non-licensed) who engage in "deliberate misconduct." In adopting the Deliberate Misconduct Rule, the NRC sought to include only violations that were knowing and intentional. This approach recognizes that it is not the NRC's role to manage human performance issues for its licensees. The industry believes that the NRC should not be addressing routine human performance matters in individual enforcement actions. While the NRC should decline individual enforcement in most cases involving human performance, the licensee remains subject to enforcement or other regulatory response and (as recognized in Section IV.A.4 of the proposed Enforcement Policy revision) licensees are expected to take appropriate remedial actions to yield sustained improvements in human performance.

In addition, the proposed revision specifically restates the definition of “deliberate misconduct” as an intentional act or omission *that the person knows*: (1) would cause a licensee to be in violation of any rule, regulation or order, or any term, condition, or limitation of any license issued by the Commission; or (2) constitutes a violation of a requirement, procedure, instruction, contract, purchase order or policy of a licensee. Proposed Revised Section VIII.A. (emphasis added); *see also* 10 C.F.R. § 50.5(c). This language accurately reflects that, for conduct to be “deliberate misconduct,” there must be a knowing violation. An intentional act is not in itself sufficient to be deliberate misconduct. There must also be an awareness that the act will violate a requirement and therefore an intent to violate. The Enforcement Policy should clearly identify that negligence, poor judgment, ignorance, and even careless disregard, are beyond the scope of Section 50.5 and individual enforcement. This point has been the source of confusion in the past and, therefore, should be more clearly explained in the guidance.

Further, the second part of the definition of “deliberate misconduct,” pertaining to knowing violations of licensee policies, procedures, instructions, etc., is incomplete. While the language is drawn from the rule, a key element of the rule is missing from the discussion. Deliberate misconduct cannot alone lead to a violation of 10 C.F.R. § 50.5. For there to be a violation (and for enforcement to be considered), a violation of licensee requirements, such as those listed in the definition, must also lead to the licensee violating (or violating but for detection) an NRC requirement. *See* 10 C.F.R. § 50.5(a)(1). As the revision is now drafted, this important aspect of the rule may be lost. The guidance should state clearly that a licensee requirement for which enforcement will be considered, must be one that, if violated, would lead to noncompliance with NRC requirements.

Another part of proposed revision that warrants highlighting is a procedural step to ensure the individual is afforded a fair opportunity to be heard. The proposed revision explicitly recognizes that “[t]he NRC will normally provide an individual an opportunity to address apparent violations before the NRC takes any individual enforcement action....” This opportunity ordinarily would be a predecisional enforcement conference. The industry stresses the importance of this step—even more so for individuals than for licensees. The procedural point should be strengthened, stating that a predecisional enforcement conference (or equivalent) will be held with individuals absent some defined “extraordinary circumstances.” Similarly, we believe that individuals should be provided the opportunity to appeal enforcement actions that are issued, even when no order or monetary penalty is involved.

The additional considerations articulated in proposed Section VIII.A.5 are, in most cases, very important. The NRC approach is designed to ensure that its

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enforcement decision takes into account all of the relevant circumstances of a particular case. As such, we believe that, for example, the employer's remedial action (e.g., disciplinary action) should be more carefully considered and, in many cases, should render enforcement action unnecessary. The industry suggests that the NRC give this particular circumstance more emphasis in the policy and the flow chart.

Finally, the proposed revision includes a definition of "licensee official" that, as in the past, makes a first line supervisor an "official." This definition is arbitrary and reaches individuals who have relatively little authority in the licensee's organization. A better term would be "license manager" because it would encompass individuals in management roles above the first line of supervision. This definition would focus the accountability involved in NRC enforcement actions at a more appropriate management level.

We appreciate the opportunity to comment on the proposed Enforcement Policy revision and look forward to discussing these comments with you. If you have any questions regarding the industry' position or rationale, please contact me or Ellen Ginsberg, NEI Deputy General Counsel (202-739-8140 or ecg@nei.org).

Sincerely,

A handwritten signature in dark ink, appearing to read "R. Beedle", with a long horizontal line extending to the left.

Ralph E. Beedle